

Decision 05-12-048

December 15, 2005

## BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application for Rehearing of Resolution  
W-4556.A. 05-09-031  
(Filed on September 29, 2005)**ORDER DENYING REHEARING  
OF RESOLUTION W-4556 AND ORDERING AN OIR****I. INTRODUCTION**

In this order we dispose of the application for rehearing of Resolution W-4556 ("Resolution") filed by the Office of Ratepayer Advocates ("ORA").

In the Resolution we granted the request of Great Oaks Water Company ("Great Oaks"), a Class A water utility, to file its General Rate Case ("GRC") by advice letter rather than by formal application. We granted this request as an experiment to determine whether and when the advice letter process may be a suitable alternative to the formal application process.

A timely application for rehearing was filed by ORA. No response was filed. In its application for rehearing ORA challenges the Resolution on the grounds that: (1) Public Utilities Code Section 455.2<sup>1</sup> and Decision (D.) 04-06-018<sup>2</sup> ("*RCP Decision*") require a formal application process for Class A water utility GRCs -- there is no exemption for experimental purposes; (2) Section 455.2 and the *RCP Decision* do not support the waiver of the GRC application requirement granted by the

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<sup>1</sup> All section references are to the Public Utilities Code unless otherwise specified.

<sup>2</sup> *Order Instituting Rulemaking on the Commission's Own Motion to Evaluate Existing Practices and Policies for Processing General Rate Cases and to Revise the General Rate Case Plan for Class A Water Companies* ("*RCP Decision*") [D.04-06-018] (2004) \_\_ Cal.P.U.C. 3<sup>rd</sup> \_\_, 2004 Cal. P.U.C. LEXIS 276.

Resolution; (3) Great Oaks does not qualify to use the advice letter process pursuant to D.92-03-093<sup>3</sup> (“*Water Co. Advice Letter Decision*”); and (4) D.05-01-032<sup>4</sup> (“*G.O. 96-A Decision*”) does not authorize the Commission to deny the due process protections afforded under the *RCP Decision* and Sections 451 and 455.2.

We have carefully considered the arguments raised in the application for rehearing and are of the opinion that good cause does not exist to grant rehearing in this particular instance, and for the reason stated below. We find that Section 455.2(c) provides the Commission with the authority to waive the GRC application requirement and allow a Class A water utility to file its GRC by advice letter. This statute also gives the Commission the discretion to determine when that waiver should be exercised.

However, we also recognize based on our further review, that our existing decisions and general order do not reflect the waiver authority under the statute or that Class A water utilities may utilize the advice letter process. We believe there may be merit to consider modifying the existing GRC advice letter process for water utilities to include certain Class A water utilities. We intend that any modification of our rules should be done in a manner that satisfies due process requirements. Thus, a modification of our rules and procedures is best accomplished by established mechanisms providing for full stakeholder participation as suggested below.

That said, this case has presented a unique circumstance in which Great Oaks has already been instructed to file its current GRC by advice letter and Great Oaks has acted in good faith and in reliance upon that instruction. As a matter of equity, and in this rare circumstance, we have decided that Great Oaks need not be required to file a

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<sup>3</sup> *Investigation on the Commission’s Own Motion Into the Financial and Operational Risks of Commission Regulated Water Utilities, and Whether Current Ratemaking Procedures and Policies Require Revision* (“*Water Co. Advice Letter Decision*”) [D.92-03-093] (1992) 43 Cal.P.U.C. 2d 568, 1992 Cal. P.U.C. Lexis 237.

<sup>4</sup> *Rulemaking for Purposes of Revising General Order 96-A Regarding Informal Filings at the Commission* (“*G.O. 96-A Decision*”) [D.05-01-032] (2005) \_\_ Cal. P.U.C. 3d \_\_, 2005 Cal. P.U.C. LEXIS 245.

formal application at this late date. (See Pub. Util. Code, §§701 & 455.2.) Accordingly, we deny rehearing. We note that our determinations are limited to the instant situation.

However, for other Class A water utility GRCs, we will issue an OIR to consider whether to permit certain Class A water companies to file their GRC by advice letter, in lieu of a formal application and to consider procedures for doing so, and to amend our existing decisions and general order, as necessary. All parties to the proceedings resulting in the RCP Decision and general order should be served with the OIR, because OIR would constitute a modification of that decision.<sup>5</sup>

## II. DISCUSSION

### A. Public Utilities Code Section 455.2 and the RCP Decision for Class A Water Utilities

ORA contends that the Resolution errs in allowing Great Oaks to submit its GRC by advice letter because pursuant to Section 455.2 and the *RCP Decision*, all Class A water utilities are required to comply with a formal application process. ORA contends that these authorities do not provide for an exemption for the purposes of an experiment. ORA also contends that the Commission's Executive Director erroneously relied on Section G of the *RCP Decision* to urge Great Oaks to seek a waiver to submit its GRC by advice letter. (Rhlg. App., at p. 5.)

#### i) Exemption

In 2003, the Legislature enacted Section 455.2,<sup>6</sup> which directs the Commission to establish a schedule to require water corporations with greater than

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<sup>5</sup> The Commission may also use the existing RCP Decision Rulemaking (R.03-09-005) or G.O. 96-A Rulemaking (R.98-07-038) to consider these issues. Parties on the service list of both proceedings should be served.

<sup>6</sup> Section 455.2 states:

“(a) The commission shall issue its final decision on a general rate case application of a water company with greater than 10,000 service connections in a manner that ensures that the commission's decision becomes effective on the first day of the first test year in the general rate case application.

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10,000 service connections to file GRC applications every three years. Water corporations with greater than 10,000 service connections are classified as Class A water utilities.<sup>7</sup> Great Oaks is a Class A water company, with approximately 20,000 service connections.

In 2004, we adopted the *RCP Decision*, to implement Section 455.2. In that decision we adopted a revised Rate Case Plan for Class A water utilities requiring Class A water utilities to submit GRC applications on a three year cycle pursuant to Section 455.2. (*RCP Decision* [D.04-06-018], *supra*, at p. 1 (slip op.)). We noted that the then existing Rate Case Plan did not provide for a mandatory filing schedule, and the purpose in adopting the revised Rate Case Plan was to require all Class A water utilities

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(b) If the commission's decision is not effective in accordance with subdivision (a), the applicant may file a tariff implementing interim rates that may be increased by an amount equal to the rate of inflation as compared to existing rates. The interim rates shall be effective on the first test day of the first test year in the general rate case application. These interim rates shall be subject to refund and shall be adjusted upward or downward back to the interim rate effective date, consistent with the final rates adopted by the commission. The commission may authorize a lesser increase in interim rates if the commission finds the rates to be in the public interest. If the presiding officer in the case determines that the commission's decision cannot be effective on the first day of the first test year due to actions by the water corporation, the presiding officer or the commission may require a different effective date for the interim rates or final rates.

(c) The commission shall establish a schedule to require every water corporation subject to the rate case plan for water corporations to file an application pursuant to the plan every three years. The plan shall include a provision to allow the filing requirements to be waived upon the mutual agreement of the commission and the water corporation.

(d) The requirements of subdivisions (a) and (b) may be waived at any time by mutual consent of the Executive Director of the commission and the water corporation." (Pub. Util. Code, § 455.2, subds. (a) – (d).)

<sup>7</sup> Pursuant to the approved Uniform System of Accounts for subdivisions of water utilities, Class A consists of more than 10,000 service connections, Class B consists of between 2,000 and 10,000 service connections, Class C consists of between 500 and 2,000 service connections, and Class D consists of fewer than 500 service connections. (*Investigation on the Commission's Own Motion Into the Financial and Operational Risks of Commission Regulated Water Utilities, and Whether Current Ratemaking Procedures and Policies Require Revision* [D.92-03-093, p. 572 fn. 1.] (1992) 43 Cal.P.U.C. 2d 568, 1992 Cal. P.U.C. LEXIS 237.)

to comply with the specific schedule and application content requirements established in the *RCP Decision*. (*Id.* at p. 19 [Ordering Paragraph 2] (slip op.).)

Resolution W-4556 exempts Great Oaks from the application requirement under Section 455.2 and the *RCP Decision*. In doing so, the Resolution states it is “an experiment to determine whether and when the advice letter process may be a suitable alternative to the formal application process.” (Resolution W-4556, at p. 1.)

Section 455.2 permits 3 types of waivers: (1) the effective date of the Commission decision on the GRC application; (2) the effective date of a tariff implementing interim rates; and (3) the schedule for filing the GRC application as well as the application filing requirement. (See Pub. Util. Code § 455.2, subds. (a) – (c).)

Nothing in our *RCP Decision* permits an exemption from the application requirement. In fact, we rejected a utility proposal to file advice letters to create related memorandum accounts for unforeseen water quality capital investments. In rejecting the advice letter process we stated:

“[d]etermining whether to create a memorandum account under these standards may well require complex factual findings and legal conclusions. The advice letter process is not well suited for such issues. **The advice letter process is for ministerial actions implementing previously approved Commission policy.**<sup>8</sup>” (*RCP Decision* [D.04-06-018], *supra*, at pp. 14-15 (slip op.), emphasis added.)

It is difficult to reconcile the factors we used to reject advice letter review of capital investments, with the Resolution which allows advice letter review of a full GRC. A GRC typically involves complex factual findings and legal conclusions. We exercise discretionary, rather than ministerial authority in making GRC determinations. Further, there is no previously approved Commission policy to allow Class A water utilities to submit GRCs by advice letter.

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<sup>8</sup> Ministerial decisions involve only the use of fixed standards or objective measurements. The public official cannot exercise discretion or personal or subjective judgment in reaching a determination.

The Resolution states that Section 454(b) provides authority for advice letter review in this instance. Section 454(b) provides in part:

“(b) The commission may adopt rules it considers reasonable and proper for each class of public utility providing for the nature of the showing required to be made in support of proposed rate changes, the form and manner of the presentation of the showing, with or without hearing, and the procedure to be followed in consideration thereof.” (Resolution W-4556, at p. 6.) (Pub. Util. Code, § 454, subd. (d).)

Reliance on Section 454(b) raises questions regarding the potential result of the Resolution, and also conflicts with established Commission practices for implementing Section 454(b). This statute governs the process for adopting rules applicable to a class of public utilities. On the one hand, Resolution W-4556 says that it is only an experiment. However, reliance on this statute in combination the Resolution’s statement that staff will evaluate the process to identify where improvement may be possible (Resolution W-4556, at p. 5.), implies creation of a more widely used advice letter mechanism, or new rule, that Class A water utilities may follow.

Consistent with Section 454(b), Commission rules, regulations, and guidelines are generally created or amended through a formal rulemaking (OIR) or investigation (OII) process.<sup>2</sup> Rule 14.2 of the Commission’s Rules of Practice and Procedure provides, in part, that OIRs are to be used for establishing new rules, regulations or guidelines for a class of public utilities or of other regulated entities (Rule 14.2(a).) The Commission’s rulemaking process requires a forum which solicits public input and allows full and meaningful participation by all interested stakeholders. In contrast, the Resolution acknowledges that the advice letter process reduces the public process (Resolution W-4556, at p. 3.)

We have consistently adhered to a formal process in adopting new rules and procedures applicable to water companies and to the advice letter process. For example:

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<sup>2</sup> See Public Utilities Code Section 1701 and Rule 14.1 through Rule 14.4 of the Commission’s Rules of Practice and Procedure.

our decision adopting the prior Rate Case Plan for Class A water utilities was the product of a rulemaking proceeding,<sup>10</sup> our decision adopting the New Rate Case Plan for Class A water utilities was the product of a rulemaking proceeding,<sup>11</sup> our decision adopting the advice letter process for certain Class B, as well as Class C and D water utilities was the product of an investigation proceeding,<sup>12</sup> and our decision amending General Order (G.O.) 96-A governing advice letter filings was the product of a rulemaking proceeding.<sup>13</sup>

Section 454(b) authorizes the adoption of new rules. Resolution W-4556 was intended to grant an isolated experimental exception rather than adopt a new rule. Accordingly, Section 454(b) does not apply here.

There is no statute or rule expressly prohibiting an experimental advice letter for filing a Class A water utility GRC. While Section 455.2 and the *RCP Decision* [D.04-06-018], *supra*, express an affirmative requirement for GRC applications, Section 455.2(c) also grants the Commission the discretion to waive the application requirement, as necessary. Nevertheless, further review convinces us that the authority granted under the statute is not reflected in our *RCP Decision*. Nor do the relevant decisions or general order contemplate that Class A water utilities may submit their GRCs by advice letter. We have not previously adopted rules and procedures regarding the characteristics of a Class A water utility that may qualify for the advice letter process or the nature of the showing required to process such a submittal. We believe there may be merit to modifying the advice letter process for water utilities to include certain Class A water utilities, and it is within our authority to do so. However, we believe that any modification of the rules and procedures currently established for Class A water company GRCs should be accomplished by traditional mechanisms providing for full stakeholder participation. These modifications could be accomplished by reopening, holding

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<sup>10</sup> *Re Schedule for Processing Rate Case Applications by Water Utilities* [D.90-08-045] (1990) 37 Cal. P.U.C. 2d 175.

<sup>11</sup> *RCP Decision* [D.04-06-018], *supra*, 2004 Cal. P.U.C. LEXIS 276.

<sup>12</sup> *Water Co. Advice Letter Decision* [D.92-03-093], *supra*, 43 Cal.P.U.C. 2d, 568.

<sup>13</sup> *G.O. 96-A Decision* [D.05-01-032], *supra*, 2005 Cal. P.U.C. LEXIS 245.

hearings (either paper or evidentiary) and amending the *RCP Decision*, reopening and amending the *Water Co. Advice Letter Decision*, and/or opening a rulemaking proceeding to adopt new advice letter rules for Class A water companies.

That said, we do not believe Great Oaks should be adversely affected by a delay in processing its current GRC as a result of our prior instruction that it should submit its GRC by advice letter. We instructed Great Oaks to file by advice letter and it relied in good faith upon that instruction. As a matter of equity, we will not rescind that order. Accordingly, for purposes of this GRC, we deny rehearing. However, as reflected in the ordering paragraphs below, we also order that an OIR be opened to consider establishing procedures for any future filing of advice letters for Class A water utility GRCs.

### **III. CONCLUSION**

For the reasons stated above, rehearing of Resolution W-4556 is denied. For purposes of allowing a Class A water utility to file a GRC by advice letter in the future, the Commission is directed to open an OIR to consider establishing procedures for doing so, and to revise the applicable existing decisions and general order accordingly.

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**THEREFORE, IT IS ORDERED** that:

1. Rehearing of Resolution W-4556, as specified above, is hereby denied.
2. The Commission is directed to open an OIR or use an existing OIR proceeding as specified in this Order, to consider establishing procedures by which small Class A water utilities may file their GRCs by advice letter.
3. The OIR shall be served on all parties on the service lists of the proceedings specified in this Order.

This order is effective today.

Dated December 15, 2005, at San Francisco, California.

MICHAEL R. PEEVEY  
President  
GEOFFREY F. BROWN  
SUSAN P. KENNEDY  
DIAN M. GRUENEICH  
JOHN A. BOHN  
Commissioners